Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RICHARD L. MATHIAS, *et al.*,

Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the court of appeals erred in holding that section 252(e)(6) of the Telecommunications Act of 1996 gives federal district courts jurisdiction to review orders of state public service commissions that resolve contract disputes under state law, where the express language of section 252(e)(6) of the Act limits federal review to determinations made by state commissions under section 252, the Act leaves supervision of the agreements to the states, and the Act prohibits implied preemption of state law.

II. Whether the court of appeals erred in holding that a state public service commission constructively waived the state's constitutional sovereign immunity by adjudicating complaints brought under state law calling for the interpretation and enforcement of privately negotiated provisions in contracts entered into pursuant to the Telecommunications Act, when after *College Savings* waivers of immunity must be deliberate, express waivers made by the state itself.

III. Whether the court of appeals erred in finding jurisdiction over the ICC, through the Commissioners, without determining whether the requirements for application of the *Ex parte Young* exception were satisfied, where Congress did not authorize suits against state commissioners under the Act, where the conduct complained of was not alleged to violate the Constitution, and where the substance of the relief sought was reversal of the ICC's order.

PARTIES TO THE PROCEEDING

The petitioners are Richard L. Mathias, Terry S. Harvill, Edward C. Hurley, Ruth K. Kretschmer, and Mary Frances Squires, in their official capacities as Commissioners of the Illinois Commerce Commission.

The respondents are Illinois Bell Telephone Company d/b/a Ameritech Illinois, WorldCom Technologies, Inc., as successor in interest to MFS Intelenet of Illinois, Inc., Teleport Communications Group, Inc., MCI Telecommunications Corp., MCIMetro Access Transmission Services, Inc., AT&T Communications of Illinois, Inc., and Focal Communications Corp.

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The Commissioners of the Illinois Commerce Commission (collectively "Commissioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case. This petition for certiorari seeks review of the court's decision holding that section 252(e)(6) of the Telecommunications Act of 1996 gives federal district courts jurisdiction to review every state commission action concerning interconnection agreements. It also seeks review of the court's holding that the Illinois Commerce Commission ("ICC") constructively waived Illinois' constitutional sovereign immunity by resolving complaints brought under Illinois law calling for the interpretation and enforcement of interconnection agreements. Further, it seeks review of the court's holding finding jurisdiction over the ICC, through the Commissioners, without determining whether the requirements for application of the *Ex parte Young* exception were satisfied.

OPINIONS BELOW

The opinion of the Court Appeals for the Seventh Circuit in *Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.* is reported at 179 F.3d 566 and is reprinted in the Appendix at pages 6a-22a. The court of appeal's order of August 19, 2000, amending its opinion is unreported and is reprinted in the Appendix at pages 3a-5a. The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is unreported and is reprinted in the Appendix at pages 23a-35a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals in *WorldCom* was entered on June 18, 1999. The court of appeals denied the

Commissioners' petition for rehearing on August 9, 2000. On November 3, 2000, Justice Stevens granted the Commissioners a 21-day extension of time for filing a petition for a writ of certiorari through November 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

1. The Supremacy Clause, U.S. art. VI, cl. 2 (Pet. App. 36a).
2. U.S. Const amend. XI (Pet. App. 36a).

STATUTES

1. Section 252 of the Telecommunications Act of 1996 (Pet. App. 36a-44a).
2. Section 601 of the Telecommunications Act of 1996 (Pet. App. 45a).
3. Section 5/13-514 of the Illinois Public Utilities Act (Pet. App. 46a-47a).

STATEMENT OF THE CASE

This case involves federal court review of an order entered by the ICC. The ICC is an agency of the State of Illinois, and it supervises and regulates telecommunications carriers in Illinois. As part of its responsibilities, the ICC administers and enforces the Illinois Public Utilities Act, 220 ILCS 5/1-101 *et seq.* (1993). ICC orders or decisions are subject to

judicial review in the Illinois Appellate Court. *Id.* § 5/10-201.

The case began at the ICC when several competing telecommunications carriers brought complaints alleging breaches of their interconnection agreements with Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech Illinois") and violations of Illinois law. The ICC resolved those complaints in favor of the competing carriers, and Ameritech Illinois sought review of the order pursuant to section 252(e)(6) of the Telecommunications Act of 1996.

A. Telecommunications Act of 1996

On February 8, 1996, Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) ("1996 Act" or "Act"), which amended the Communications Act of 1934. A keystone of the Act is the introduction of competition into local telephone service markets. The Act imposes general duties on all telecommunications carriers and further obligations on all local exchange carriers ("LECs"). 47 U.S.C. § 251(a), (b). Recognizing that new entrants to the local telephone market would not be able rapidly and efficiently to duplicate the facilities developed over time by incumbent LECs, Congress imposed additional obligations on incumbent LECs like Ameritech Illinois to, among other things, allow new entrants to "interconnect" with their networks, gain unbundled access to discrete elements of their networks, and purchase their telecommunications services for resale at wholesale prices. *See id.* § 251(c). The means of obtaining interconnection, unbundled access, and resale are through

agreements negotiated in accordance with section 252 of the Act.

B. Section 252

Section 252 of the Act is titled "Procedures For Negotiation, Arbitration, And Approval Of Agreements." As its title suggests, section 252 establishes procedures for negotiating, arbitrating, and approving interconnection agreements between incumbent LECs and requesting carriers. Section 252 sets forth a four-part structure for accomplishing this task and implementing the Act.

First, Congress chose to rely in the first instance on voluntary negotiations between incumbent LECs and requesting carriers. If they reach a voluntary agreement, section 252(a)(1) relieves them of the substantive requirements of section 251(b) and (c).

Second, if private carrier-to-carrier negotiations prove unsuccessful, Congress provided for compulsory arbitration of any open issues to reach an agreement. Section 252(b) allows any party to the negotiation, during the period from the 135th to the 160th day from the initial request for negotiation, to petition a state commission to arbitrate any open issues. The state commission must resolve all unresolved issues raised by the arbitration petition and any response within nine months from the time the incumbent LEC receives a request for interconnection, services, or network elements under section 251. 47 U.S.C. § 252(b)(4)(A), (C).

Third, Congress required that all interconnection agreements be submitted to a state commission for approval

before becoming effective. *Id.* § 252(e)(1). A state commission may only reject an agreement (or parts thereof) adopted by negotiation if it finds that the agreement discriminates against a carrier not a party to the agreement or if it is not in the public interest. *Id.* § 252(e)(2)(A). An agreement adopted by arbitration (or parts thereof) may be rejected if it fails to comply with section 251, regulations prescribed by the Federal Communications Commission ("FCC") pursuant to section 251, or the pricing standards in section 252(d). *Id.* § 252(e)(2)(B). Once a final agreement is submitted, a state commission must act on it within ninety days if it is a negotiated agreement (or negotiated portion of an agreement), or thirty days if it is an arbitrated agreement (or arbitrated portion of an agreement). If it does not, the agreement is deemed to be approved. *Id.* § 252(e)(4). Once the agreement is approved, it must be filed with the state commission. *Id.* § 252(h).

Fourth, Congress provided a means for judicial review of a state commission's determinations made under section 252. 47 U.S.C. § 252(e)(6).

C. The Interconnection Agreements

In 1996 and 1997, Teleport Communications Group, Inc. ("TCG"), WorldCom Technologies, Inc. ("WorldCom"), Focal Communications Corporation of Illinois ("Focal"), AT&T Communications of Illinois, Inc. ("AT&T"), and MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (jointly "MCI") (collectively "Competitive Carriers") executed interconnection agreements with Ameritech Illinois and submitted those agreements to the ICC in accordance with

section 252(e)(1) of the Act. The TCG, WorldCom, and Focal agreements are privately negotiated agreements. The MCI and AT&T agreements contain privately negotiated portions and arbitrated portions. None of the arbitrated provisions in those agreements is involved in this case. The reciprocal compensation provisions in each agreement were privately negotiated by the respective carriers. Pursuant to section 252(e)(2), the ICC approved all of the interconnection agreements.

D. Proceedings at the Illinois Commerce Commission

In the fall of 1997, after performing under their agreements for some time, TCG, WorldCom, and MCI filed complaints against Ameritech Illinois. In their complaints, each carrier alleged that Ameritech Illinois breached the terms of its respective ICC-approved interconnection agreement, violated prior ICC orders, and violated various sections of the Illinois Public Utilities Act ("IPUA"), 220 ILCS 5/1-101 *et seq.* (1993). *See* Pet. App. 10a. For example, TCG complained that Ameritech Illinois refused to pay TCG reciprocal compensation for local calls originated by end users on Ameritech Illinois' network and terminated to Internet Service Providers ("ISPs") on TCG's network in violation of Section 5.6.1 of its interconnection agreement with Ameritech Illinois. TCG requested that the ICC find and declare that i) such calls are local calls subject to reciprocal compensation under its interconnection agreement, ii) Ameritech Illinois is obligated to pay TCG for past due amounts with interest, and iii) Ameritech Illinois should be reprimanded for anticompetitive and unilateral withholding of monies owed to TCG. WorldCom and MCI each requested similar relief. The ICC consolidated the three

complaints and granted petitions to intervene filed by AT&T and Focal.

On March 11, 1998, the ICC entered a 17-page written order granting the consolidated complaints, finding that the disputed calls to ISPs were calls subject to reciprocal compensation according to the terms of the parties' interconnection agreements. ("March 11 Order" or "Order"). The ICC found that Ameritech Illinois' conduct in stopping its reciprocal compensation payments to the complainants had violated its interconnection agreements. Accordingly, the ICC ordered Ameritech Illinois to compensate the complainants for all past due reciprocal compensation amounts and ordered Ameritech and the complainants to resume making payments in accordance with their agreements. *See* Pet. App. 10a.

E. The Federal Court Proceedings Below

Dissatisfied with the outcome, Ameritech Illinois filed a complaint in federal district court seeking review of the ICC's Order pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331.[1] Pet. App. 24a. In its complaint, Ameritech Illinois named the Commissioners — not the ICC — as defendants. The Commissioners immediately moved to dismiss all claims against them arguing, among other things, that the district court lacked subject matter jurisdiction over Ameritech Illinois' complaint under section 252(e)(6) and

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1. It also filed a petition for review of the ICC's Order in the Appellate Court of Illinois for the Third District. The Appellate Court stayed the appeal pending resolution of the proceeding in federal district court.

section 1331 and that the Eleventh Amendment to the U.S. Constitution barred the action. The district court denied the motions, determining that it had exclusive jurisdiction under section 252(e)(6) to review the actions of the ICC in interpreting and enforcing agreements and finding that the Eleventh Amendment was no bar to its review. The district court decided the merits and affirmed the ICC's Order. (Pet. App. 25a).

The Commissioners appealed to the Seventh Circuit. On June 18, 1999, the Seventh Circuit in *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999), *amended*, 1999 U.S. App. LEXIS 20635 (Aug. 19, 1999), denied the Commissioners' statutory and sovereign immunity objections and "affirm[ed] the decision of the district court affirming the order of the Illinois Commerce Commission." Pet. App. 22a. In denying the Commissioners' objections, the court relied principally on its earlier decision in *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 183 F.3d 558 (7th Cir. 1999), a case involving review of arbitrated terms of an agreement. The court found the Commissioners' sovereign immunity argument "no longer tenable" after *MCI*, in which the court held that the ICC's participation in the arbitration and approval functions in the Act constituted a constructive waiver of immunity. Pet. App. 12a-13a.

Ignoring the Commissioners' primary argument that in resolving complaints brought under state law the ICC did not make a determination under section 252, the court also found that jurisdiction existed to review the ICC's Order under section 252(e)(6). Once again the court followed *MCI*, in which the court had held that section 252(e)(6) provides for

judicial review of state commission "actions" and that "Congress intended that state commissions be parties to the federal court suits reviewing their actions." Pet. App. 13a-14a. The court held that "every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then move to state court if the first suit yields the answer 'no.' " Pet. App. 5a.

On June 23, 1999, this Court issued *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999), *Alden v. Maine*, 119 S. Ct. 2240 (1999), and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199 (1999), three opinions involving state sovereign immunity. Two days later, the court in *MCI* granted rehearing.[2] The WorldCom court held the Commissioners' petition for rehearing in abeyance pending decision on rehearing in MCI. Pet. App. 4a.

On rehearing in *MCI*, the Seventh Circuit affirmed its earlier decision. *MCI v. Illinois Commerce Comm'n*, 222 F.3d 323 (7th Cir. 2000). The ICC and the Commissioners have filed a petition for certiorari seeking review of the *MCI*

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2. Shortly after the *MCI* court granted rehearing, several appeals were taken from Judge Crabb's decision in *Wisconsin Bell v. Public Service Commission of Wisconsin*, 57 F. Supp.2d 710 (W.D. Wis. 1999), granting the Wisconsin Public Service Commission's and its commissioners' motions to dismiss based on the Eleventh Amendment. The court consolidated the Wisconsin appeals with the *MCI* appeal for purposes of argument and disposition.

decision. Their petition has been assigned Docket No. 00-744. The Wisconsin Public Service Commission and its commissioners have sought similar review. Their petition has been assigned Docket No. 00-653. On August 9, 2000, the *WorldCom* court denied the Commissioners' petition for rehearing and made no changes to its opinion. Pet. App. 2a.

REASONS FOR GRANTING THE WRIT

The 1996 Act is a major piece of federal legislation that "fundamentally restructures local telephone markets" and "profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721, 726, 738 (1999) ("*Iowa Utilities*"). The Act's goals of fostering competition in the local markets and furthering competition in the long-distance market aim to bring lower prices, better quality service and technological innovations to all telephone subscribers. To implement its provisions, the Act enlists the states and the FCC in a cooperative effort. Thus, the issues implicated by the Act are of substantial local and national importance.

Despite the cooperative federal-state effort, the Act does not give federal courts jurisdiction to review every state commission decision concerning interconnection agreements. The Seventh Circuit's construction of section 252(e)(6) radically alters the federal-state balance of power and injects the federal courts into state administrative review schemes. Under the Seventh Circuit's sweeping interpretation, section 252(e)(6) radically shifts judicial review of many state commission actions involving purely local matters from state courts to federal courts and allows every telecommunications carrier with an interconnection

agreement approved by a state commission to seek appellate review of state commission actions in federal court. Congress did not intend the narrow judicial review provision in section 252(e)(6) for review of state commission determinations made in the arbitration and approval process to subject every subsequent state commission decision touching upon interconnection agreements to judicial review in federal district court. The Act reserves the supervision of the performance of interconnection agreements to state commissions and state courts, the traditional regulators and reviewers of local telephone matters.

In addition, the Seventh Circuit held that the Eleventh Amendment stands as no bar to claims against state commissions for review of their decisions made under state law. The importance of constitutional sovereign immunity to the States cannot be doubted. The Seventh Circuit's constructive waiver holding conflicts with this Court's recent decision in *College Savings*. It also conflicts with the Sixth Circuit's view in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000). Furthermore, in determining that it could review the ICC's Order through an action against the Commissioners, the Seventh Circuit impermissibly enlarged the narrow, judicially-created *Ex parte Young* exception in derogation of Illinois' constitutional sovereign immunity.

The Seventh Circuit's decision raises substantial statutory and constitutional questions implicating important issues of federalism that this Court should settle. Given the importance of the Act and its substantial impact on the Nation's economy, given the importance of uniform administrative review schemes to the states, and given the

importance of constitutional sovereign immunity to the states, the Court should grant review.

I. Section 252(e)(6) Does Not Give Federal Courts Jurisdiction to Review Every State Commission Action Concerning Interconnection Agreements.

The court of appeals fundamentally misconstrued the Act to allow federal district court review of every state commission action concerning interconnection agreements. In doing so, the court ignored the Act's purpose and structure and the plain language of section 252(e)(6) limiting federal jurisdiction to those state commission determinations made under section 252 (*i.e.*, determinations made in the arbitration and approval process). In addition, in holding that federal jurisdiction under section 252(e)(6) is exclusive when it exists, the court necessarily found, without so much as discussing it, that section 252(e)(6) preempted state judicial review laws in violation of section 601 of the Act. The court's opinion contradicted the plain meaning of the Act, implicitly preempted state judicial review laws in violation of section 601 of the Act, and fundamentally altered the federal-state constitutional balance.

A. Section 252(e)(6) Limits Federal District Court Review to State Commission Determinations Made Under Section 252.

The plain language of section 252(e)(6) limits federal district court review to state commission determinations made *under section 252*. Section 252(e)(6) provides in relevant part: "In any case in which a State commission makes a determination under this section, any party

aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section." Pet. App. 42a-43a. In its Order granting the Competing Carriers' complaints brought under the IPUA, however, the ICC did not make a determination *under section 252* as required by section 252(e)(6). In fact, for a state commission to act "under section 252," its jurisdiction must be invoked pursuant to section 252, and the only way for that to occur is for a carrier to i) file a petition requesting mediation under section 252(a)(2), ii) file a petition requesting arbitration under section 252(b)(1), or iii) submit an agreement requesting approval under section 252(e)(1). The Competing Carriers, however, invoked the ICC's authority under Illinois law, and the ICC adjudicated their complaints under Illinois law. None of the findings and conclusions in the ICC's Order was made *under section 252*. The only state commission determinations that can be made under section 252 are those determinations made in the arbitration and approval process.

Section 252(e)(6) cannot be read to include state commission decisions interpreting previously approved agreements without rendering parts of the statute meaningless. For example, the FCC's authority to preempt state commission jurisdiction under section 252(e)(5) makes sense only with respect to the mediation and arbitration responsibilities given to state commissions under § 252. *See* 47 C.F.R. § 51.801 (1999). State commissions perform these section 252 responsibilities only upon specific request. 47 U.S.C. § 252(a)(2); *id.* § 252(b)(1). Similarly, the first sentence in § 252(e)(6) is rendered a nullity if the second

sentence is read to include state commission decisions interpreting and enforcing agreements. Indeed, the FCC is not authorized to preempt state commissions' jurisdiction to hear complaints brought under *state law*. *See* 47 U.S.C. § 152(b); *id.* § 252(e)(5). Congress carefully limited the application of sections 252(e)(4-6) to state commissions' "action[s]," "responsibilit[ies]," and "determination[s]" *under section 252*. The court of appeals' interpretation reads the limiting words "under this section" (*i.e.*, section 252) right out of section 252(e)(6).

That the Act denies federal district courts jurisdiction to review state commission orders interpreting and enforcing agreements is bolstered by section 252(e)(4). Section 252(e)(4) removes from state courts only the jurisdiction to review actions of state commissions in approving or rejecting agreements under section 252. Pet. App. 41a-42a. Congress very easily could have written: "No state court shall have jurisdiction to review the action of a State commission approving, rejecting, interpreting, and enforcing an agreement under this section." *See* 47 U.S.C. § 252(e)(4). It did not.[3] As the Act makes plain, Congress in section 252

3. A comparison of section 252(e)(6) with other provisions of the Act confirms that when Congress intended to allow federal review of any state actions it did so expressly. *See* 47 U.S.C. § 332(c)(7)(B)(iii) ("*Any decision* by a State or local government....") (emphasis added); 47 U.S.C. § 332(c)(7)(B)(v) ("Any person adversely affected by *any* final action or failure to act by a State or local government ... may ... commence an action in any court of competent jurisdiction ....") (emphasis added). These new subsections were enacted as section 704 of the Act.

created a four-part structure designed to establish agreements. The Act establishes a bright line between arbitrating and approving an agreement on one hand and interpreting and enforcing it, on the other. Congress recognized that state commissions are well-suited to address disputes arising from interconnection agreements, and for precisely that reason Congress left to state commissions and state courts the responsibility to supervise the performance of those agreements.

What is more, a party to an agreement cannot be "aggrieved" under section 252(e)(6) by a state commission decision *approving* the negotiated portion of an agreement. Section 252(e)(2) establishes the standards by which state commissions review interconnection agreements. When reviewing a negotiated portion of an agreement under section 252(e)(2)(A), a state commission may only reject that portion if it finds i) the negotiated portion discriminates against a telecommunications carrier not a party to the agreement, or ii) the implementation of the negotiated portion is not consistent with the public interest, convenience, and necessity. Hence, the only state commission determination made under section 252 involving a negotiated portion of an agreement by which a party to that agreement could possibly be "aggrieved" within the meaning of section 252(e)(6) is a state commission's determination *rejecting* the agreement.

The Competing Carriers and Ameritech Illinois voluntarily negotiated and executed the reciprocal compensation provisions and jointly submitted them to the ICC for approval as part of their interconnection agreements. Consequently, Ameritech Illinois cannot turn around and

claim that it is now "aggrieved" by the ICC's decision approving those very same contract provisions. Ameritech Illinois is not a party aggrieved by the ICC's decisions approving the voluntarily negotiated reciprocal compensation provisions. The court of appeals in effect transformed a claim challenging the ICC's Order interpreting voluntarily negotiated terms of previously approved interconnection agreements into a claim attacking the ICC's approval of those agreements under section 252(e)(1) in order to establish federal jurisdiction under section 252(e)(6).

B. Judicial Review of the ICC's Order Lay Exclusively in the Illinois Appellate Court.

The court's construction of section 252(e)(6) to require federal court review of every state commission action concerning agreements also violates section 601, the Act's rule of construction prohibiting implied preemption of state law. Pet. App. 45a. Before and after the Act, states possess plenary authority over local telephone matters unless that authority is expressly preempted. 47 U.S.C. § 152(b); *Iowa Utilities*, 119 S. Ct. 721, 731 n.8 (1999); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360, 370-71 (1986). The Act did not preempt existing state jurisdiction to resolve disputes between carriers calling for the interpretation and enforcement of agreements. There is absolutely no mention of the interpretation or enforcement of agreements in the Act. Because the Act makes no mention of enforcing agreements — indeed, Congress consciously removed from state courts in section 252(e)(4) only those state commission decisions approving or rejecting agreements, leaving state courts to review state commission enforcement decisions —

the authority to interpret and enforce agreements derives from a state commission's plenary authority under state law to resolve disputes over local telephone matters.

This Court's decision in *Iowa Utilities* confirms that review of the ICC's Order lay exclusively in the Illinois Appellate Court. The Court specifically observed that: Where the Act "is silent, § 152(b) [the provision establishing the dual federal-state regulatory model] continues to function." *Iowa Utilities*, 119 S. Ct. at 731 n.8. As mentioned above, the Act says nothing about the enforcement of agreements. In creating a process designed to establish agreements and requiring those agreements to be filed with state commissions, *see* 47 U.S.C. § 252(h), Congress deliberately left the supervision of the agreements to state commissions and subsequent judicial review to state courts.

In Illinois, specifically, the ICC's authority to supervise, interpret, and enforce agreements comes from state law, not the Act. In addition to its general authority over telecommunications carriers operating in Illinois, *e.g.*, 220 ILCS 5/10-201; *id.* § 5/13-101, the ICC is specifically empowered to resolve disputes and enforce agreements regardless of whether it approved a particular agreement under section 252, *id.* § 5/13-514(8). The means for obtaining review of ICC orders is set forth in section 5/10-201, which fixes review exclusively in the Illinois Appellate Court. 220 ILCS 5/10-201. Thus, the court's decision requiring carriers complaining of ICC actions concerning an agreement to seek federal court review preempts section 5/10-201 of the IPUA in violation of section 601 of the Act.

In sum, section 252(e)(6) does not confer plenary jurisdiction on federal courts to review every action of state commissions concerning interconnection agreements. Given the precision with which Congress tailored the provisions in section 252, it is clear that the Act limits federal district court review to state commission determinations made in the arbitration and approval process. The court of appeals impermissibly expanded federal jurisdiction beyond that which Congress expressly provided for in section 252(e)(6) to include subsequent state commission orders resolving complaints brought under state law calling for the interpretation of disputed provisions in agreements.

II. The Seventh Circuit's Constructive Waiver Holding Is Contrary to *College Savings* and Conflicts With the Sixth Circuit's Decision in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000).

The court of appeal's constructive waiver holding is contrary to *College Savings* and the Court's cases requiring a deliberate, express waiver of immunity by the state itself. In *College Savings*, the Court expressly overruled *Parden v. Terminal Ry. Co. of Alabama Docks Dep't*, 377 U.S. 184 (1964), and repudiated the doctrine of constructive waiver under the Commerce Clause. The Court rejected the idea of implied waiver of state sovereign immunity as incompatible with its cases requiring an express waiver of immunity by the state itself. *College Savings*, 119 S. Ct. at 2228. *College Savings* confirms that a state's waiver must be a deliberate, express waiver made by the state itself and, like federal sovereign immunity waivers, cannot be implied. *Id.* at 2228-29. In this case, no party claimed nor could it, that Illinois expressly waived the state's immunity from suit in federal

court. Illinois has not expressly waived its Eleventh Amendment immunity from suit in federal court, *see Frances J. v. Wright*, 19 F.3d 337, 342-43 (7th Cir. 1994), and the ICC and the Commissioners are not authorized to waive Illinois' sovereign immunity, *see Estate of Porter v. Illinois*, 36 F.3d 684, 690 (7th Cir 1990) ("State officials can only waive a State's immunity if they are specifically authorized to do so by the state's constitution, statutes, or decisions."). Thus, after *College Savings*, this express waiver inquiry is dispositive, and Illinois cannot be found to have waived its immunity from suit in federal court.

In finding that Illinois waived its immunity, the court of appeals followed its earlier decision in *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir. 1999), in which the court determined that the ICC's voluntary participation in the arbitration and approval functions in the Act constituted a constructive waiver of Illinois' sovereign immunity. Pet. App. 12a-13a. As mentioned earlier, the ICC and the Commissioners strongly disagree with the *MCI* court's constructive waiver holding and have sought review of that court's opinion on rehearing in this Court. Nevertheless, this case is fundamentally different from *MCI*. In *MCI*, plaintiff MCI petitioned the ICC to arbitrate open issues under section 252(b)(1) and submitted an agreement for approval under section 252(e)(1). *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 330 (7th Cir. 2000). MCI then sought review under section 252(e)(6) of the ICC's actions in arbitrating and approving the agreement. *Id.*

Here, however, the Competing Carriers brought complaints against Ameritech Illinois under Illinois law that

called for the interpretation and enforcement of their agreements. The ICC resolved those complaints in favor of the Competing Carriers. Ameritech sought review of the Order in federal court under section 252(e)(6). The Order is not the result of proceedings initiated under section 252. The ICC has a statutory obligation to adjudicate complaints, and its duty to enforce agreements under the IPUA exists regardless of whether it performed the arbitration and approval functions under section 252. *See* 220 ILCS 5/10-108-10, *id.* § 5/13-514(8). The ICC cannot choose not to act on complaints filed under state law. To do so would be an abdication of its sate statutory obligations. The court of appeals failed to appreciate this crucial distinction and held that a state commission constructively waives its sovereign immunity by adjudicating any complaint brought under state law calling for the interpretation and enforcement of an interconnection agreement. The court's opinion finding that Illinois constructively consented to suit in federal court by acting upon complaints filed under state law calling for the interpretation and enforcement of interconnection agreements between Ameritech Illinois and the Competing Carriers is contrary to *College Savings*.

In addition, the Seventh Circuit's constructive waiver holding conflicts with the Sixth Circuit's opinion in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000). In *GTE*, the Sixth Circuit stated that "it is virtually certain that a state utility commission's decision to accept regulatory authority under the [1996 Act] cannot legitimately be construed as a valid waiver of sovereign immunity." *GTE*, 209 F.3d at 922 n.6. It is even clearer that in adjudicating complaints brought under state law a state commission does not constructively

waive the state's sovereign immunity. Indeed, even to ask whether a state commission constructively waives a state's sovereign immunity from suit in federal court when adjudicating complaints brought under *state law* is a non sequitur. Because the Seventh Circuit's constructive waiver holding conflicts with *College Savings* and *GTE*, the Court should grant review.

III. The Decision Below Conflicts With *Ex Parte Young*, 209 U.S. 123 (1908).

Although the court of appeals asserted jurisdiction over the ICC, through the Commissioners, it did not determine whether Ameritech Illinois' claims against the Commissioners fit within the narrow *Ex parte Young* exception to the Eleventh Amendment. In allowing Ameritech Illinois' claims against the Commissioners, the court erred because 1) Congress did not intend for *Ex parte Young* actions to be brought against individual state commissioners, 2) Ameritech Illinois did not allege a constitutional violation which is a necessary predicate for application of *Ex parte Young*, and 3) Ameritech Illinois did not allege an ongoing violation by the Commissioners.

A. Congress Did Not Intend for *Ex parte Young* Actions to Be Brought Against Individual State Commissioners.

The threshold question in the *Ex parte Young* inquiry is whether Congress intended to authorize *Ex parte Young* actions. *Seminole Tribe v. Florida*, 517 U.S. 44, 75 n.17. If Congress did not intend to authorize suits against state officials as individuals, then the *Ex parte Young* exception is

unavailable. Here, the purpose and structure of the Act and the plain language in section 252(e)(6), make clear that Congress did not intend for review of state commission determinations made under section 252 to be accomplished through *Ex parte Young* actions against the commissioners themselves. The Act does not authorize actions against individual state officials. The Act refers only to state commissions. The term "state commissioner" or "commissioner" is not even mentioned in the Act. More particularly, section 252(e)(6), the articulated basis for federal jurisdiction, refers only to state commissions. The court of appeals failed to undertake this initial inquiry and, as a consequence, erred in allowing Ameritech Illinois' claims against the Commissioners. *See* Pet. App. 14a.

The court of appeals also failed to reconcile its reading of the Act to require review of administrative agency actions — whether state commission or FCC — with a suit against the individual commissioners under an *Ex parte Young* theory. *Id.* The court construed section 252(e)(6) to require that state commissions be made parties to suits reviewing their actions "just as the FCC is a party to suits seeking review of its actions." *Id.* (internal quotations omitted). Thus, in the court's view, section 252(e)(6) provides for judicial review of regulatory actions made by an administrative agency, whether federal or state. Under federal law, the FCC is named as a party to appeals from its orders. *Ingalls Shipbuilding v. Director, OWCP*, 519 U.S. 248, 267 (1997); *see* Fed. R. App. P. 15(a) (requiring that agency be named respondent in review of its orders). There is no indication in section 252(e)(6) that an aggrieved party may sue the FCC commissioners individually or that it may seek declaratory,

injunctive, or relief other than administrative review of the FCC's actions. Similarly, under Illinois law the ICC is named as a party to appeal of its orders, 220 ILCS 5/10-201; 155 Ill.2d R.335(a), and there is no indication in section 252(e)(6) that an aggrieved party may sue a commissioner of a state commission or that it may seek declaratory, injunctive, or relief other than administrative review of a state commission's determinations made under section 252. Indeed, it would be anomalous if Congress had intended to expose state commissioners "to the full panoply of a federal court's remedial powers, including, presumably, contempt sanctions," when the Act, as interpreted by the court, contemplates judicial review of administrative agency action. *Seminole Tribe*, 514 U.S. at 75. The court's reading of the review provided in the Act is simply incompatible with an action based on an *Ex parte Young* theory.

Furthermore, in simply treating the ICC and the Commissioners as interchangeable parties, the court failed to appreciate the larger principle reconfirmed in *Seminole Tribe*, that where Congress creates a remedial scheme for the enforcement of a particular federal right, the courts should not supplement that remedial scheme with additional remedies. Section 252 establishes a limited remedial scheme for review of state commission determinations made in approving or rejecting agreements. The review under section 252(e)(6) does not include federal district court review of state commission orders interpreting previously approved agreements or suits against individual state commissioners to otherwise accomplish federal review of those state commission orders. In this case Ameritech Illinois brought an action against the Commissioners under section 252(e)(6)

to circumvent the review provided for under Illinois law and impermissibly enlarge its rights under the Act. The court of appeals rewrote the statutory scheme, rendered superfluous the limited statutory remedy provided under section 252(e)(6) and permitted Ameritech Illinois to obtain relief against the individual commissioners that it could not otherwise obtain. As a consequence, the court's opinion allowing *Ex parte Young* actions under the Act was improper and contrary to this Court's precedent.

B. The *Ex Parte Young* Exception Applies Only to Ongoing Constitutional Violations by State Officials.

The basis of the *Ex parte Young* doctrine is that when a state officer acts in violation of the Constitution, he cannot claim to be acting on behalf of the state for purposes of the Eleventh Amendment and, therefore, an action against him is not a suit against a state barred by the Eleventh Amendment. *Ex parte Young*, 209 U.S. 123, 159-60 (1908); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 88, 102 (1984) ("*Pennhurst II*"). To the ICC's knowledge, in the time since *Ex parte Young* was decided, this Court has not expanded the narrow *Ex parte Young* exception beyond alleged constitutional violations. This is not surprising since the Court has repeatedly instructed that the *Ex parte Young* exception is a narrow exception, not to be given an expansive interpretation. *E.g.*, *Pennhurst II*, 465 U.S. at 102.

The *Ex Parte Young* exception is inapplicable to Ameritech Illinois' claims because the company did not allege that the individual commissioners violated the

Constitution, whether by virtue of the Supremacy Clause[4] or more familiar constitutional provisions. In allowing the claims against the Commissioners the court of appeal's decision is contrary to long-standing precedent of this Court limiting application of the *Ex parte Young* exception to alleged constitutional violations and, if there were any doubt, the Court's recent sovereign immunity cases resolve it.

This Court's sovereign immunity decisions last Term confirm that the *Ex parte Young* exception applies only to ongoing constitutional violations by state officials. In *College Savings* and *Alden*, the Court reaffirmed that state sovereign immunity is *constitutional*, deriving from the structure of the Constitution itself. *College Savings*, 119 S. Ct. 2230; *Alden*, 119 S. Ct. at 2254. The Court also reaffirmed that the principle of state immunity embodied in the Eleventh Amendment is a constitutional limitation on the federal judicial power established in Article III of the Constitution. *Alden*, 119 S. Ct. at 2266. The *Ex parte Young* doctrine, however, is a judicially-created narrow exception to the Eleventh Amendment. It represents an attempt by the Supreme Court to "harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Pennhurst II*, 465 U.S. at 105.

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4. Importantly, the Supremacy Clause is not a source of federal rights; rather it secures federal rights by according them priority when they come into conflict with state law. *Golden State Transit v. Los Angeles*, 493 U.S. 103, 107 (1989).

As *Alden* confirms, the *Ex parte Young* exception to the Eleventh Amendment is necessary to ensure the *Constitution* "remains the supreme law of the land." *Alden*, 119 S. Ct. at 2263. Thus, although state sovereign immunity is constitutional, the Court has determined that such immunity must yield in certain cases to protect other rights and privileges secured by the Constitution. Consequently, *Ex parte Young* requires a constitutional predicate for its application. In fact, given the constitutional origins of sovereign immunity and its limits on congressional power under Article I and federal judicial power under Article III, there would appear to be little difference between Congress using its Article I powers to abrogate a state's Eleventh Amendment immunity (an action found to be without constitutional authority in *Seminole Tribe*) and a federal court using *Ex parte Young* to accomplish the same result by allowing private suits alleging nonconstitutional, federal statutory violations by state officials. In each case, the *constitutional* justification for such action is lacking.

Here, Congress had no constitutional authority to subject Illinois to private suits in federal court under the Act, an exercise of Congress' commerce power. The ICC's adjudication of the Competing Carriers' complaints, in which it resolved disputes over privately negotiated reciprocal compensation provisions in interconnection agreements, did not challenge the supremacy of the Constitution or violate any right protected by the Constitution. *See Alden*, 119 S. Ct. at 2263. Unlike a typical *Ex parte Young* action brought to enjoin a state official's enforcement of a state law alleged to conflict with federal law, in this case Ameritech Illinois claimed the ICC erred in

interpreting privately negotiated portions of its agreements — an action state law specifically authorizes the ICC to take. *See Papasan v. Allain*, 478 U.S. 266, 277 (1986) ("In accordance with its original rationale, *Young* applies only where the underlying authorization upon which the named official acts is asserted to be illegal.").

The ICC is specifically authorized under state law to decide the issues raised in the Competing Carriers' complaints. 220 ILCS 5/13-514(8); *see id* §§ 5/10-101; 5/10-108. No contrary claim was advanced, nor could it be. Given the power to make such decisions, however, an allegedly erroneous decision is insufficient to strip Illinois of its constitutional sovereign immunity through an *Ex parte Young* action against the Commissioners. As the Court stated in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949):

> It is argued that an officer given the power to make decisions is only given the power to make correct decisions. If his decisions are not correct, then his action based on those decisions is beyond his authority and not the action of the sovereign. There is no warrant for such a contention in cases in which the decision made by the officer does not relate to the terms of his statutory authority. Certainly the jurisdiction of a court to decide a case does not disappear if its decision on the merits is wrong. And we have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so. We therefore reject the contention here.

Id. at 695 (citation omitted); *see Pennhurst II*, 465 U.S. at 113 n.22 ("*Larson* thus made clear that, at least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief is effectively against it."); *see Newkirk v. Bigard*, 109 Ill. 2d 28, 37-38 (1985) ("An agency's jurisdiction or authority is not lost merely because its order may be erroneous). Accordingly, the court erred in finding that the individual commissioners could be sued in an *Ex parte Young* action when Ameritech Illinois failed to allege any violation of the Constitution.

C. The ICC's Order Does Not Constitute an Ongoing Violation.

The court of appeals further erred by not inquiring as to whether Ameritech Illinois' complaint for judicial review alleged ongoing violations and requested prospective relief, as required by this Court. In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court expressly confined the *Ex parte Young* exception to suits requesting prospective injunctive relief to prevent future violations of federal law. *Id.* at 655. "Consequently, *Young* has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past...." *Papasan*, 478 U.S. at 277-78. The focus of the *Ex parte Young* inquiry is on the *actions of the state officials*, and the relevant inquiry is whether prospective relief could prevent an ongoing violation of federal law by *state officials*. *Pennhurst II*, 465 U.S. at 102-03; *Lett v. Magnant*, 965 F.2d 251, 255 (7th Cir. 1992). In allowing Ameritech Illinois' claims for

review of the ICC's Order to go forward against the Commissioners, the court's opinion eviscerates the limitations on the *Ex parte Young* exception and is contrary to this Court's decisions.

The ICC in its Order resolved a dispute between the carriers regarding the interpretation of privately negotiated provisions in their agreements. In seeking federal review of the Order, Ameritech Illinois requested a declaration that the ICC violated federal law in the past, relief not within the narrow *Ex parte Young* exception. Ameritech also purportedly sought to enjoin enforcement of the ICC's Order. Properly characterized, Ameritech sought reversal of the ICC's Order. Pet. App. 14a ("Ameritech said that it brought this action to 'challenge the ICC Order.'"). That the ICC's Order is still in place does not transform that past decision into a present, ongoing violation by the Commissioners. Ameritech Illinois did not claim that the Commissioners themselves were violating federal law when it filed its claims, let alone that they were continuing to violate federal law afterwards. In short, Ameritech Illinois sought relief from a past ICC decision, but the ICC's Order itself does not constitute the ongoing violation for purposes of *Ex parte Young*. *See Republic of Paraguay v. Allen*, 134 F.3d 622, 628 (4th Cir.), *aff'd sub nom. Breard v. Greene*, 523 U.S. 371 (1998).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 28, 2000

APPENDIX A – ORDER, DENYING REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED AUGUST 9, 2000

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 9, 2000

Nos. 98-3150, 98-3322 & 98-4080

ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS,

Plaintiff-Appellant,
Cross-Appellee,

v.

WORLDCOM TECHNOLOGIES, INC. as successor in interest to MFS INTELENET OF ILLINOIS, INC., TELEPORT COMMUNICATIONS GROUP INC., MCI TELECOMMUNICATIONS CORP. and MCIMETRO ACCESS TRANS-MISSION SERVICES, INC., AT&T COMMUNICATIONS OF ILLINOIS, INC., and FOCAL COMMUNICATIONS CORPORATION,

Defendants-Appellees,

and

DAN MILLER, RICHARD KOLHAUSER, RUTH KRETSCHMER, KARL MCDERMOTT, and BRENT BOHLEN, Commissioners of the Illinois Commerce Commission (in their official capacities and not as individuals),

Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 98 C 1925
David H. Coar, Judge

Before
Hon. William J. Bauer, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*
Hon. Terrence T. Evans, *Circuit Judge*

ORDER

Petitions for rehearing and petitions for rehearing en banc have been filed in this case. The decision on rehearing issued in *MCI Telecommunications Corp. v. Illinois Bell Telephone Co. & The Illinois Commerce Commission*, __ F.3d __ (7th Cir. July 24, 2000), does not require that we make any changes to the opinion we issued on June 18. 1999. For this and other reasons, the petitions for rehearing are unanimously denied. No judge has requested a vote on the petitions for rehearing en banc.[1] Accordingly, those petitions are also denied.

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1 Chief Judge Joel M. Flaum and Circuit Judges John L. Coffey and Ilana Diamond Rovner took no part in the consideration of these petitions for rehearing.

APPENDIX B – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AMENDING JUNE 18, 1999 OPINION, DATED AUGUST 19, 1999

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 19, 1999

Nos. 98-3150, 98-3322 & 98-4080

ILLINOIS BELL TELEPHONE COMPANY d/b/a/ AMERITECH ILLINOIS,

Plaintiff-Appellant,
Cross-Appellee,

v.

WORLDCOM TECHNOLOGIES, INC., as successor in interest to MFS INTELENET OF ILLINOIS, INC., TELEPORT COMMUNICATIONS GROUP, INC., MCI TELECOMMUNICATIONS CORP. and MCIMETRO ACCESS TRANS-MISSION SERVICES, INC., AT&T COMMUNICATIONS OF ILLINOIS, INC. and FOCAL COMMUNICATIONS CORPORATION,

Defendants-Appellees.

and

DAN MILLER, RICHARD KOHLHAUSER, RUTH KRETSCHMER, KARL MCDERMOTT, and BRENT

BOHLEN, Commissioners of the Illinois Commerce Commission (in their official capacities and not as individuals),

Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
No. 98 C 1925
David H. Coar, *Judge.*

Before
Hon. William J. Bauer, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

ORDER

The petitions for rehearing and rehearing en banc will be held in abeyance pending the decision on rehearing in *MCI Telecommunications Corp. v. Illinois Commerce Commission,* No. 98-2127. Within 10 days after the panel releases its opinion on rehearing in *MCI*, the parties should file supplemental memoranda discussing the effect, if any, of *MCI* on this case.

The court amends its opinion by adding the following language at the end:

> Lest there be any misunderstanding about what this conclusion means, we add that any issues of state law remain open for determination in the proper forum. Section 252(e)(6) authorizes a federal court to determine whether the agency's decision departs from federal law. A decision "interpreting" an

agreement contrary to its terms creates a different kind of problem--one under the law of contracts, and therefore one for which a state forum can supply a remedy.

This allocation of authority has a potential to cause problems. Federal jurisdiction under § 252 (e)(6) is exclusive when it exists. Thus every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer "no." This system may not have much to recommend it, but, as the Supreme Court observed in *Iowa Utilities Board*, the 1996 Act has its share of glitches, and if this is another, then the legislature can provide a repair.

APPENDIX C – OPINION IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED JUNE 18, 1999

In the
United States Court of Appeals
for the Seventh Circuit

Nos. 98-3150, 98-3322, and 98-4080

ILLINOIS BELL TELEPHONE COMPANY
d/b/a AMERITECH ILLINOIS,

Plaintiff-Appellant, Cross-Appellee,

v.

WORLDCOM TECHNOLOGIES, INC. as successor in interest to MFS INTELENET OF ILLINOIS, INC. TELEPORT COMMUNICATIONS GROUP, INC., MCI TELECOMMUNICATIONS CORP. and MCIMETRO ACCESS TRANSMISSION SERVICES, INC., AT&T COMMUNICATIONS OF ILLINOIS, INC., and FOCAL COMMUNICATIONS CORPORATION,

Defendants-Appellees,

and

DAN MILLER, RICHARD KOLHAUSER, RUTH KRETSCHMER, KARL MCDERMOTT, and BRENT BOHLEN, Commissioners of the Illinois Commerce Commission (in their official capacities and not as individuals),

Defendants-Appellees, Cross-Appellants

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 1925 -- **David H. Coar**, Judge

ARGUED MAY 10, 1999 -- DECIDED JUNE 18, 1999

Before Bauer, Kanne, and Evans, *Circuit Judges*.

Evans, *Circuit Judge*. Once we determine whether we have jurisdiction (and the scope of that jurisdiction) under the Telecommunications Act of 1996, 47 U.S.C. §§ 251 and 252, what we will have before us today is a rather narrow issue on the merits: whether a decision of the Illinois Commerce Commission regarding reciprocal compensation for telephone connections to Internet service providers violates federal law.

Until the 1990's local phone service was monopolistic; in fact, many people viewed it as a natural monopoly. Regulation was left to the states. Now, technological advances have taken us far beyond the sort of telephone services parodied by Ernestine.[1] Today, we even have competition in local markets. Through the Telecommunications Act of 1996 Congress has opened the door to competing local exchange carriers and has inserted both the Federal Communications Commission (FCC) and the federal courts into the previously

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1 Lily Tomlin's character on Rowan and Martin's 1960's TV show, Laugh-In who with an officious tone and a lot of nasal snorting sat at her switchboard and asked, "Have I reached the party to whom I am speaking?"

state-regulated monopoly. Just how far into the scheme does the federal presence reach? is the $64,000 question.

Illinois Bell Telephone Company, doing business as Ameritech Illinois (Ameritech) is the incumbent local exchange carrier in Chicago and most of the rest of Illinois. Worldcom Technologies, Inc., Teleport Communications Groups, Inc., MCI Telecommunications Corp., Inc. and MCIMetro Access Transmission Services, Inc., AT&T Communications of Illinois, Inc., and Focal Communications Corporation have, under the Act, recently become competitors with Ameritech for local telephone business. When a competitor builds its own local network it interconnects its facilities with Ameritech so that calls can be made between customers of the two networks. For example, when an Ameritech customer makes a call, the person or entity called may be the customer of another of the carriers; Ameritech bills its customer for the call as a local call. The same is true if a customer of a competing carrier calls an Ameritech customer. If this were all that happened, the carrier whose customer received the call would not be compensated for its part in the transaction. But the 1996 Act provides for "reciprocal compensation" for local calls and it requires companies to establish agreements for intercarrier compensation for the calls. If the call is a local call, then, under the Act in the first example, Ameritech would have to pay reciprocal compensation to the other carrier for "terminating" the call (in the lingo of the industry). In this way, both carriers get money. Ameritech and each of the other carriers have interconnection agreements as required by the Act, 47 U.S.C. §§ 252(b)(5) and 252(d).

Section 252(d) sets out the procedure by which interconnection agreements are to be reached. The carriers must first attempt to negotiate in good faith to reach voluntary agreements. At any time in the negotiations a party may ask a state commission to participate as a mediator. If no agreement is reached, the Act provides for compulsory arbitration of unresolved issues. Any party may petition a state commission to arbitrate the dispute. Furthermore, any agreement reached by negotiation or arbitration must be submitted to the state commission for approval. If a state commission fails to carry out its responsibilities, the FCC will preempt the state commission's jurisdiction and act for the state commission. A state commission's failure to approve or reject an agreement, however, it is not a failure to act; rather, the agreement will be deemed approved.

The interconnection agreements between Ameritech and each of the carriers in this case are nearly identical. They became effective in late 1996 and early 1997 and have been approved by the Illinois Commerce Commission (ICC). For a time, the parties routinely paid reciprocal compensation under the agreement.

Trouble arose, however, when Ameritech became concerned that it was paying out more in reciprocal compensation than it was collecting. On July 3, 1997, it sent a letter to the other carriers, claiming that the imbalance was due to their inclusion of calls involving Internet service providers (ISPs) in the requests for reciprocal compensation. Ameritech said that it would no longer pay compensation for calls to Internet service providers because those calls were not local calls. It seems that the other carriers may have been concentrating their marketing on ISPs. The agreements provided

for compensation per minute of use, and calls to ISPs are, quite predictably, of long duration.

That is true because Internet service providers are companies which offer their customers connections to the Internet through the telephone network. ISPs are assigned a local telephone number and the telephone companies, including Ameritech, bill their customers for a local call when the customers call ISPs within the local calling area. However, the ultimate connection is usually to a website in a distant location, giving Ameritech a basis for claiming that the calls were not local calls subject to the reciprocal compensation agreements. For reasons we need not get into, Ameritech is not obligated to compensate the carrier of the ISP if the call is deemed to be long-distance, rather than local. In other words, at the present time if a call to an ISP is not subject to reciprocal compensation, the ISP's carrier is not compensated.

Not surprisingly, when Ameritech cut off payments the other carriers filed complaints with the ICC. On March 11, 1998, the ICC ruled in their favor, finding that the plain language of the agreements mandates reciprocal compensation; that there is no basis for treating these calls differently from other local calls. The ICC, in fact, called Ameritech's conduct anti-competitive.

Ameritech filed the present case in the District Court for the Northern District of Illinois, naming as defendants the competing carriers and the Commissioners of the ICC in their official capacity. Ameritech also filed a petition for review of the order in a state court. District Judge David H. Coar, to whom the federal case was assigned, reached a decision, as Ameritech says, "affirming the ICC Order" on July 21, 1998, and entered judgment in favor of the competing companies on August 4, 1998. In entering judgment under Rule 54(b) of the Federal Rules of Civil Procedure, Judge Coar stated:

> This Court has currently pending motions to dismiss the Illinois Commerce Commission [which, correctly labeled, would be a motion of the Commissioners] from this action. Because of the novelty and urgency of the issues presented on the merits of the action and because the Eleventh Amendment issues presented by the Commission's Motions to Dismiss were not related to the merits of the underlying claim, this Court directed the Commission to participate in briefing of the issues on the merits without prejudice to its rights to proceed on its Eleventh Amendment motions.

On August 25 the motions of the Commissioners to dismiss the action were denied. Before August 25 Ameritech had filed an appeal of the July 21 decision; after the decision on the motions to dismiss, it filed a second notice of appeal naming all defendants; the Commissioners filed a cross-appeal. All three appeal were consolidated.

Appellate jurisdiction over the Commissioners is somewhat problematic in that no formal judgment was entered against them. However, it is clear that the Commissioners participated in the litigation on the merits of this action. In entering judgment pursuant to Rule 54(b) on August 4, Judge Coar made it clear that his decision disposed of the merits of the case, but also allowed the Commissioners to continue

with their claim that the federal court was a forum in which they did not belong, obviously an issue which should have preceded a decision on the merits. The decision on the motions to dismiss resolved that issue, making the decision on the merits binding on the Commissioners (a decision, of course, going in their favor). It is a situation in which "formal defects in the terminating order do not prevent appeal." *Otis v. City of Chicago*, 29 F.3d. 1159, 1165 (7th Cir. 1994). *See also Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978). Although we conclude that we have jurisdiction over the appeal as it involves the Commissioners, we are dismayed by this snag and, we might add, by the cursory manner in which Ameritech and the Commissioners treated the issue, despite our order to brief it.

We proceed to the merits. The issue as Ameritech presented it to us is whether the calls to Internet service providers are local calls, subject to reciprocal compensation, or long-distance calls, often interstate. That is the issue which was exhaustively briefed; that, in fact, is the easy issue. But that is not, and cannot be, the issue we decide.

The appeal of the Commissioners of the Illinois Commerce Commission will lead us, however circuitously, to the real issue before us. The Commissioners contend that the federal courts have no jurisdiction over them. Originally they contended that, among other things, sovereign immunity prevents federal courts from exercising jurisdiction over them in their official capacity because in their official capacity they are the Commission, a state entity, and the State of Illinois has not waived its sovereign immunity. That argument is no longer tenable following our recent decision in *MCI Telecommunications Corp. v. Illinois Commerce Commission*, 168 F.3d 315 (7th Cir. 1999), in which we determined that the participation of the Commission in the scheme set out in the Act is a waiver of the state's sovereign immunity.

Another of the Commissioners' contentions, however, is that the Act, which admittedly provides for some federal court review over some actions of the state commissions, does not provide review in this instance. This is an attack on our subject matter jurisdiction. The Commissioners say that the scope of review under § 252(e) is limited to review of an "agreement"; nowhere, they say, is a "federal district court authorized to review and *order* of a state commission under state law. . . ."

Section 252(e)(6) says in part:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

The commissioners rely on the word "agreement" and ignore the word "determination" despite the fact that in an earlier order in this case --- *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, 157 F.3d 500, 501 (7th Cir. 1998) -- we said flatly, "Decisions of state agencies implementing the 1996 Act are reviewable in federal district courts." In addition, although the present case arises in a slightly different context, our decision in *MCI* explains the nature of our jurisdiction. We noted that subsection 252(e)(6) provides for ju-

dicial review of "state commission actions," not simply review of "interconnection agreements" and that subsection 252(e)(4), when read in conjunction with subsection 252(e)(6), shows that Congress contemplated suits against state defendants in federal court. It provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." We concluded that this language meant that Congress envisioned suits reviewing "actions" by state commissions and that those suits were to be brought exclusively in the federal courts. In addition, we said that Congress intended that the "state commissions be parties to the federal court suits reviewing their actions, just as the FCC is a party to suits seeking review of its actions." At 320.

Of course, the Commission itself is not a party to the action before us even though, in its briefing in this court, Ameritech said that it brought the action to "challenge the ICC Order." Similarly, in its complaint Ameritech said that it was filing the action pursuant to § 252(e) to challenge determinations made by the Illinois Commerce Commission. Even though the Commission is not a named party, the Commisisoners themselves acknowledge that. In their official capacity, they are the Commission. We have jurisdiction under § 252(e)(6) to review the actions of the Commission and will proceed on that basis.

But what is the scope of review under § 252(e)? Writing for the Court in *AT&T v. Iowa Utilities Board,* 119 S. Ct. 721, 733 n.10 (1999), Justice Scalia indicated that the Act was broad federal occupation of territory once belonging to the states and that in turning some "federal policymaking . . . over to state administrative agencies," Congress set out a

scheme which "is decidedly novel." He continued, "saying that the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel as well," or, as he put it elsewhere, it is a "surpassing strange" setup. At 730 n.6.

Our view of the scope of review, however, has already been set out in *MCI* in which we indicated that we would review a state commission's action for "compliance with the requirements of § 251 and § 252 of the Telecommunications Act . . . ." We also said that we would not review those actions for compliance with state law. 168 F.3d at 320. The issue before us today, then, is whether the ICC, in determining that under the agreements the parties intended that calls to Internet service providers would be subject to reciprocal compensation, violated federal law.

We have long given deference to the pronouncements of the FCC. *See, e.g., FCC v. National Citizens Comm. for Broad.,* 436 U.S. 775 (1978); *Illinois Bell Tel. Co. v. FCC,* 740 F.2d 465 (1984). It also appears that none of the telephone companies involved in the present case dispute that deference is in order; in fact, not surprisingly in this instance, everyone thinks the FCC is on its side. That agency is in the process of calling for hearings on proposed rules and will presumably carry out its duty to resolve ambiguities in the statute. *Iowa Util. Bd.*, 119 S. Ct. at 738. But in the absence of a rule, the agency issued a declaratory ruling on February 26, 1999, on the issue of whether calls to Internet service providers are local calls. *See* Declaratory Ruling in CC Docket No. 96-98 (February 26, 1999). The ruling was issued after the briefing in this appeal and obviously after the agreements at issue here were drafted.

The FCC said

> that the communications at issue here do not terminate at the ISP's local server, as CLEC's [competing local exchange carriers] and ISP's contend, but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state.

Declaratory Ruling at 9 ¶ 12. The FCC declined to separate ISP-bound traffic into two components: an intrastate service going to the local ISP and a portion, more likely than not to be interstate, going from the ISP to the websites. The conclusion was that ISP traffic for "jurisdictional purposes [is] a continuous transmission from the end user to a distant Internet site." At 11 ¶ 13. This is the part of the ruling which Ameritech likes.

But having determined its jurisdiction, the FCC went on to a discussion of regulation of the calls in the absence of a rule covering compensation for these calls. It is this part of the ruling that the other carriers prefer. Because there is no rule yet promulgated on this issue, the FCC said:

> We find no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism.

At 15 ¶ 21. So parties may

> voluntarily include this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act, even if these statutory provisions do not apply as a matter of law. Where parties have agreed to include this traffic within their section 251 and 252 interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions.

At 15 ¶ 22. Even if ISP traffic is largely interstate, parties may have agreed to treat it as subject to reciprocal compensation or, in fact, a state commission may impose reciprocal compensation in arbitration proceedings:

> A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any Commission rule regarding ISP-bound traffic. By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism.

At 18 ¶ 26.

Now that the FCC has issued its ruling, and noting again that we defer to its reasonable interpretations of the Act, our task is to examine the ICC order, not to determine whether the ICC correctly applied principles of state contract law, but to see whether its decision violates federal law, as set out in the Act or in the FCC's interpretation.

The short answer is that it does not. The FCC could not have made clearer that in the absence of a rule, a state agency's interpretation of an agreement so as to require payment of reciprocal compensation does not necessarily violate federal law.

The agreements here provide:

> Reciprocal Compensation applies for transport, and termination of Local Traffic billable by Ameritech or [the other carrier] that a Telephone Exchange Service Customer originates on Ameritech's or [the other carrier's] network for termination on the other Party's network.

All the contracts contain the following definition, " 'Reciprocal Compensation' is As Described in the Act." In the contracts with AT&T, Focal Communications Corporation, Worldcom Technologies, Inc., MCIMetro Access Transmission Services, another relevant definition is " 'Local Traffic' means a call the distance of which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the terminating NXX or as otherwise determined by the FCC or Commission for purposes of Reciprocal Compensation . . . ." The "Commission" referred to is the Illinois Commerce Commission. The contract with Teleport Communications Group provides that " 'Local Traffic' means local service area calls as defined by the Commission," which again is the ICC.

The ICC concluded that the agreement unambiguously provide that:

> reciprocal compensation is applicable to local traffic billable by Ameritech. Since Ameritech Illinois currently charges end users local service charges when completing calls that terminate at the complainants' ISP customers, the plain reading of the interconnection agreements inevitably leads to the conclusion that reciprocal compensation charges should apply to those calls.

ICC order dated March 18, 1998, at 11.

Ameritech attacks this conclusion primarily by stating that the Act does not require reciprocal compensation; the agreements precisely track the Act (reciprocal compensation is "as described in the Act"); therefore the agreements cannot require reciprocal compensation for calls to ISPs.

The syllogism is an oversimplification. That the Act does not *require* reciprocal compensation for calls to ISPs is not to say that it *prohibits* it. The Act simply sets out the obligations of all local exchange carriers to provide for reciprocal compensation: "Reciprocal compensation. The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." § 251 (b)(5). Then in § 252 (d)(2) state commissions are instructed that terms and conditions for reciprocal compensation are not to be considered reasonable unless they provide "for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier" and that the costs be determined on the basis of a "reasonable approximation of the additional costs of terminating such calls." The Act clearly does not set out spe-

cific conditions which one party could enforce against the other. The details are left to the parties, or the commissions, to work cut.

The ICC's conclusion -- that reciprocal compensation should apply to traffic Ameritech bills as local traffic -- does not violate the Act or the FCC's interpretation of the Act. In fact, the Commission was doing what it is charged with doing in the Act and in the FCC ruling. It was determining what the parties intended under the agreements. The FCC sets out factors which the state commissions may consider in evaluating the parties' intentions, concluding that the factors are illustrative only and that state commissions, not the FCC, are the arbiters of what factors are relevant in the determination. At 15 ¶ 24.

Predictably, however, Ameritech questions the ICC's determination regarding the parties' intentions. Ameritech contends that the agreements were negotiated against a backdrop of a long-standing FCC policy that ISP traffic is not local traffic. But that contention is shaky. In fact, the FCC recognized that agreements negotiated prior to the February ruling, as the ones at issue here were, were negotiated in the "context of this Commission's longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements." At 15 ¶ 24. Undeterred, Ameritech points to prior statements and actions of the FCC, which could be interpreted as at least hinting that such traffic may ultimately be considered interstate. One such factor is that ISPs have long had an exemption from paying access fees for their connections to distant websites. The argument is that there would be no need for an exemption were the calls not interstate. Ameritech also relies heavily on *In re GTE Telephone*

Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148, CC Docket No. 98-79 (F.C.C. Oct. 30, 1998), and to a lesser degree on *In re Bell Atlantic, Tel. Cos.; Bell Atlantic Tariff No. 1; Bell Atlantic Transmittal No. 1076,* CC Docket Nos. 98-168 et al. (F.C.C. Nov. 30 1998), for the proposition that Internet traffic terminates on the Internet, not at the local server. Consequently, Ameritech says, "Internet traffic is not subject to reciprocal compensation under the Agreements or federal law." It is only in a footnote in its brief filed December 23, 1998, that Ameritech acknowledges another statement, in our view an important statement, made by the FCC. We quote from *GTE*:

> This Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including, circuit-switched dial-up traffic originated by interconnecting LECs.

At 1-2 ¶ 2. Also, in *GTE,* the FCC announced its attention to issue a separate order on reciprocal compensation issues, a reference, of course, to the February ruling. Putting aside the obvious fact that both *GTE* and *Bell Atlantic* were issued after the agreements in this case and so are not relevant to what the parties had in mind at the time of the negotiations, it seems clear that the FCC would not agree with Ameritech that it has had a long-standing policy against treating calls to ISPs as local calls.

There is nothing in the FCC ruling on reciprocal compensation which would prohibit a call from being a local call for some, but not all, purposes. The ICC considered relevant fac-

tors in evaluating the agreements, including the situation at the time the agreements were negotiated. Other relevant factors are that Ameritech's customers do not pay toll charges for calls to their ISP; Ameritech bills the customer for a local call. Customers dial a local number. The calls are routed over local lines, not long distance lines. Also quite telling from our point of view is that in the agreements, the parties specifically granted to the ICC the right to define local traffic for reciprocal compensation purposes.

The FCC could not have made clearer its willingness -- at least until the time a rule in promulgated -- to let state commissions make the call. We see no violation of the Act in giving such deference to state commissions; in fact, the Act specifically provides state commissions with an important role to play in the field of interconnection agreements. Additionally, the ICC is in the mainstream of thought on the issue. Not that the majority rules in these matters, but the commissions in well over half the states have made the same determination that the ICC made, including some interpretations made after the February ruling. In short, nothing in what the ICC said violates federal law in existence at this time. We affirm the decision of the district court affirming the order of the Illinois Commerce Commission.

A true Copy:

Teste:

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Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX D – MEMORANDUM OPINION AND ORDER IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION, DATED AUGUST 25, 1998

No. 98 C 1925

ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS,

Plaintiff,

v.

WORLDCOM TECHNOLOGIES, INC. as a successor in interest to MFS INTELENET OF ILLINOIS, INC., TELEPORT COMMUNICATIONSGROUP INC., MCI TELECOMMUNICATIONS CORPORATION and MCIMETRO ACCESS TRANSMISSION SERVICES, INC., AT&T COMMUNICATIONS OF ILLINOIS, INC., and FOCAL COMMUNICATIONS CORPORATION and DAN MILLER, RICHARD KOLHAUSER,RUTH KRETSCHMER, KARL MCDERMOTT, and BRENT BOHLEN, Commissioners of the Illinois Commerce Commission (In Their Official Capacities and not as Individuals),

Defendants.

JUDGE DAVID H. COAR

MEMORANDUM OPINION AND ORDER

Currently before the court is the defendant Commissioners' first and second motions to dismiss the complaint of Illinois Bell Telephone Company. For the reasons stated in this

Memorandum Opinion and Order, the Commissioners' motions are DENIED.

I. PROCEDURAL BACKGROUND

Plaintiff Illinois Bell Telephone Co. d/b/a Ameritech Illinois ("Ameritech") filed the instant suit pursuant to Section 252(c)(6) of the Telecommunications Act of 1996,[1] Pub. L. No. 104-104, 100 Stat. 56 (1996) (codified at 47 U.S.C. § 151, *et seq.*) (the "Act" or the "Telecommunications Act"), 28 U.S.C. § 131 and 28 U.S.C. § 1367. The suit challenges a determination made by the Illinois Commerce Commission ("ICC" or "the Commission") regarding Interconnection Agreements between Ameritech and several of the defendants.

On May 18, 1998, the Commissioners of the ICC ("the Commissioners") filed a motion to dismiss arguing that the court lacks subject matter jurisdiction under 28 U.S.C.§ 1331 and that this case is barred by the Eleventh Amendment. On May 20, 1998, this court ordered briefing on the Commissioners' motion to dismiss. Due to the expedited nature of this case, this court determined that it would rule on the defendant's motion to dismiss separately from the ruling on the merits. On June 12, 1998, the Commissioners filed a second motion to dismiss, arguing that Ameritech's complaint was barred by the doctrines of collateral estoppel and res judicata and that this court should abstain from hearing this case under the doctrines of *Burnford* and *Younger*.

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1 For general background on the Telecommunications Act, see *MCI Telecommunications v. Illinois Bell Telephone Co.*, No. 97 C. 2225 *et al.*, 1998 WL 156678, at *1-2 (N.D. Ill. March 31, 1998).

On July 23, 1998, this court issued a Memorandum Opinion and Order on the merits of the instant action, upholding the ICC's determination that Internet calls are "local traffic" as defined by the Interconnection Agreements. *See Illinois Bell Telephone Co. v. Worldcom Technologies, Inc.*, No. 98 C 1925, 1998 WL 419493 (N.D. Ill. July 23, 1998). This court's ruling was, however, without prejudice to the Commissioners' right to proceed on its motion to dismiss.

II. FACTS

Much of the background in the instant case is discussed in this court's earlier Opinion, so it is not necessary to review it in detail here. *See id.* *1. In 1996 and 1997, the ICC approved Interconnection Agreements entered into between Ameritech and the defendant carriers[2] in the instant case. The Interconnection Agreements all contained reciprocal compensation provisions whereby Ameritech and the defendant carriers agreed to compensate each other for the transport and termination of local traffic. Ameritech believed that, under the Agreements, Internet traffic was not "local" and refused to pay reciprocal compensation for the transport and termination of Internet traffic. According to Ameritech, such calls are properly classified as long distance and therefore not subject to reciprocal compensation. The defendant carriers filed complaints with the ICC regarding this issue. On March 11, 1998 the ICC issued a ruling determining that

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2 Teleport Communications Group, Inc., WorldCom Technologies, Inc. MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc., AT&T Communications of Illinois, Inc., and Focal Corporation.

Internet calls are local. Ameritech subsequently filed the instant case seeking review of the ICC's order.

III. DISCUSSION

The defendant Commissioners' motions to dismiss raise four different arguments: (1) lack of subject matter jurisdiction; (2) Eleventh Amendment bar; (3) *res judicata* and collateral estoppel; and, (4) abstention. This court will analyze each argument in turn.

A. Subject Matter Jurisdiction

The Commissioners' first argument is that this court lacks subject matter jurisdiction to proceed. Specifically, the Commissioners state that neither Section 252(e)(6) nor 28 U.S.C. § 1331 authorizes this type of review in federal district court. The standard of review for a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction depends upon the purpose of the motion. *See Freiburger v. Emery Air Charter, Inc.*, 795 F. Supp. 253, 256 (N.D. Ill. 1992); 5A Wright & Miller, *Federal Practice & Procedure: Civil.2d*, § 1363 at 456 (2d ed. 1990). If, as in the instant case, the motion simply challenges the sufficiency ~~of the~~ allegations of subject matter jurisdiction, the court must accept as true all well-plead factual allegations and draw all reasonable inferences in favor of the plaintiff. *United Transp. Union v. Gateway Western Ry. Co.*, 78 F.3d 1208 (7th Cir. 1996) (citing *Rueth v. U.S. E.P.A.*, 13 F.3d 227, 229 (7th Cir. 1993)).

Ameritech asserts that subject matter jurisdiction is proper under Section 252(e)(6) of the Telecommunications Act. Section 252(e)(6) provides that:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C.§ 252(e)(6) (1998). The Commissioners first argue that ICC's order which is the subject of review in this case is not a "determination" within the meaning of Section 252(e)(6). Therefore, Ameritech cannot be "aggrieved" by a determination by the state commission and cannot bring an action under the Act. Second, the Commissioners contend that Section 252(e)(6) does not provide for federal court review of an order of a state commission involving the interpretation and enforcement of an Interconnection Agreement after the Agreement has been submitted to a state commission and approved. This court finds that neither argument has merit.

The Commissioners cite recent federal district court decisions in support of their position that the ICC has not made a reviewable "determination.". However, this court finds that the cases relied on by the Commissioners do not support such a position. *See GTE South Inc. v. Morrison*, 957 F. Supp. 800 (E.D. Va 1997); *GTE North v. Glazer*, 989 F. Supp. 922 (N. D. Ohio 1997); *GTE North v. McCarty*, 978 F. Supp. 827 (N.D. Ind. 1997); *GTE Northwest v. Hamilton*, 971 F. Supp. 1350 (D. Or. 1997). In all of these district court decisions, the court found that subject matter jurisdiction was lacking due to the fact that the state commission had not yet approved or rejected an interconnection agreement by the

parties. Therefore, the courts found that there was no "determination" that was ripe for review. *See e.g.*, *Morrison*, 97 F. Supp. at 804 ("The statute's structure and purpose would be thwarted if this Court's review commenced before the completion of the [state commission's] proceedings."). The instant case arises under a very different context. Here, Ameritech seeks review of a state commission decision interpreting and enforcing an already approved agreement. Therefore, the cases cited by the Commissioners are not controlling.

In a recent Eighth Circuit decision interpreting the Act, *Iowa Utilities Board v. Federal Communications Commission*, 120 F.3d 753, 804 n. 24 (8th Cir.1997), *cert. denied*, *AT&T Corp. v. Iowa Utilities Bd.* __ U.S. __, 118 S. Ct. 879 (1998), the court found stated that "[w]e believe that the enforcement decisions of state commissions would also be subject to federal district court review under subsection 252(e)(6)." This court finds that such an interpretation of the Act is consistent with the goals and structure of the Act. To hold otherwise would be to allow the state commissions to make critical decisions interpreting federal laws and policies, which was not Congress' intent in passing a federal communications act. *See U.S. West Communications v. Hix*, 986 F. Supp. 13, 17 (D. Colo. 1997)("[S]tate commissions, while having experience in regulating local exchange carriers in intrastate matters, have little or no expertise in implementing federal laws and policies and do not have the nationwide perspective characteristic of a federal agency."). The Act specifically provides that federal courts have exclusive jurisdiction to review Interconnection Agreements and to ensure that those agreements meet federal requirements. *See MCI*

Telecommunications, No. 97 C 2225 *et al.*, 1998 WL 156678 at *14 (finding that § 252(e)(6) provides for exclusive review of agreements in federal court); 47 U.S.C. § 252(e)(4)("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section."). Allowing state court review of state commissions' rulings interpreting agreements would run afoul of Congress' intent. See *Michigan Bell Telephone Co. v. MFS Intelnet of Michigan, Inc.*, No. 5:98 CV 18, __ F. Supp. 2d __, __, 1998 WL 413749, at *4 (W.D. Mich. July 21, 1998) ("[C]onsideration of the statutory scheme demonstrates that permitting state court review of this type of Order would directly contravene the intent of Congress."). In conclusion, this court finds that the ICC's order interpreting the meaning of the reciprocal compensation provision of the Interconnection Agreements constitutes a "determination" under the meaning of the Act that is subject to review in federal court.[3]

B. Eleventh Amendment

The Commissioners claim that Ameritech's suit is barred by the Eleventh Amendment. This court addressed the identical argument in a previous case brought under the Telecommunications Act. *See MCI Telecommunications v. Illinois Bell Telephone Co.*, No. 97 C 2225 *et al.*, 1998 WL 156678 (N.D. Ill. March 31, 1998). Perhaps by way of com-

3 As the Court has found that subject matter jurisdiction is present pursuant to 47 U.S.C. § 252(e)(6), it is not necessary to review the Commissioners' second argument that subject matter jurisdiction was not properly alleged pursuant to 28 U.S.C. § 1331.

mentary on their view of the rationale of that decision, the Commissioners do not even so much as acknowledge it in their motion to dismiss. In their reply brief, it is clear that they intend the instant motion to serve as a motion to reconsider the earlier ruling. This court therefore refers that parties to its earlier decision, which discussed the issue of immunity at length and held that: (1) the state's voluntary participation in the regulatory scheme constituted waiver of Eleventh Amendment Immunity, see *id.*, at *7-8, and, (2) the doctrine of *Ex parte Young* allows the suit against the Commissioners in their official capacities because they involve ongoing violations of federal law and seek prospective relief, *see id.*, at *13. This court therefore denies the Commissioners' motion to dismiss on the basis of Eleventh Amendment immunity.

C. Res Judicata and Collateral Estoppel

In their second motion to dismiss, the Commissioners argue that Ameritech's suit is barred by the doctrines of res judicata and collateral estoppel. *Res judicata* is a judicial doctrine designed to ensure the finality of judicial decisions. See *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986). Res judicata, also called claim preclusion, bars the same parties or their privies from relitigating any issue that was raised in a prior judgment or could have been raised in the prior action. See *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 945 (7th Cir. 1981). There are three threshold requirements to be considered in applying res judicata: (1) identity of the parties or their privies; (2) identity of the causes of action; and, (3) a final judgment on the merits. *See Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). A court must find each of these threshold requirements in order to apply res judicata as a bar. The Commissioners argues that the elements of claim preclusion are satisfied: the parties are the same, the actions are identical in substance, and the ICC's March 11, 1998 order constitutes a final judgment on the merits.

Under the doctrine of collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414 (1980). A federal court applies state collateral estoppel principles in determining whether a state court judicial determination precludes relitigation of an issue. *See Studio Art Theatre v. City of Evansville*, 76 F.3d 128, 130 (7th Cir.), *cert denied*, __ U.S. __, 117 S. Ct. 177 (1996). In determining the preclusive effect of a prior state court judgment, federal courts must look to state law and determine whether another state court would give preclusive effect to the prior proceeding. *Kunzelman v. Thompson*, 799 F.2d 1172, 1176 (7th Cir. 1986). A federal court must give the same preclusive effect to a state court ruling as would a court in the rendering state. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 896 (1984). Under Illinois collateral estoppel principles, four elements must be met for collateral estoppel to apply: "(1) the issue sought to be precluded must be the same as that involved in the prior litigation, (2) the issue must have been actually litigated, (3) the determination of the issue must have been essential to the final judgment, and (4) the party against whom estoppel is invoked must be fully represented in the prior action." *La Preferida, Inc. v. Cerveceria Modelo, S. A. de C.V.*, 914 F.2d 900, 906 (7th Cir. 1990). The Commissioners contend that

all four elements have been satisfied, and that there is "no question" that Ameritech raised and fully litigated before the ICC the issues now presented in its complaint.[4]

This court finds, however, that the doctrines of res judicata and collateral estoppel are inapplicable to the instant case. As previously stated, this court has exclusive juridiction to review determinations made by the ICC interpreting and enforcing interconnection agreements. *See supra* Part III.A. This decision is supported by the Eighth Circuit's recognition that "the enforcement decisions of state commissions would also be subject to federal district court review under subsection 252(e)(6)." *Iowa Utilities Board*, 120 F.3d at 904 n. 24. As an appeal from an administrative decision, this court has jurisdiction to review *de novo* the state commissions' interpretation of law. All other issues, including factual findings, are reviewed with substantial deference. See *Illinois Bell Telephone Co.*, No. 98 C 1925, 1998 WL419493, at *2-3. The fact that Congress gave federal courts jurisdiction to review such decisions negates any argument that the state commission's determination must be given preclusive effect. To hold otherwise would controvert the purpose of the Act.

E. Abstention

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4 Counts I through IV of its complaint were decided before the ICC and therefore Ameritech is estopped from relitigating these claims. The Commissioners argue that Count V, a state law claim based on supplemental jurisdiction, would have to be dismissed as well.

Finally, the Commissioners argue that this court should abstain from exercising its jurisdiction under the *Burford* and *Younger* abstention doctrines. "Federal courts have a 'virtually unflagging obligation to exercise the jurisdiction given them.' " *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15, 103 S. Ct. 927, 936 (1983) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S. Ct. 1236, 1244 (1976)). Notwithstanding this obligation, a court may abstain from exercising its jurisdiction in certain, narrowly construed circumstances. The Supreme Court has identified four categories of circumstances in which abstention may be appropriate. *See Colorado River*, 424 U.S. at 814-18, 96 S. Ct. at 1244-46.

1. *Burnford* Doctrine

Under what is commonly referred to as the "Burnford doctrine," where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361, 109 S. Ct. 2506, 2514 (1989) (quoting *Colorado River*, 424 U.S. at 814, 96 S. Ct. at 1245).

The Commissioners argue that both of the alternate *Burford* rationales for abstention are satisfied. However, this court finds that neither *Burnford* rationale applies to the instant case. First, the Commissioners have not made any convincing showing that there are difficult questions of state law presented. In fact, Count V is the only count that is brought under state law. The remaining counts were brought under the Telecommunications Act, a *federal* law. Second, the Commissioners have not demonstrated that federal review would be disruptive of state policy. The instant case involves the discrete question of whether calls terminated at Internet Service Providers are local for purposes of the interconnection agreements. The ICC's ruling on this issue was based entirely on the language of the Agreements themselves and federal law. *See Illinois Bell Telephone*, No., 98 C 1925, 1998 WL419493, at *7-8. Therefore, no state policy that will be threatened by federal review.

2. *Younger* Doctrine

Under the *Younger* abstention doctrine, in the absence of extraordinary circumstances, a federal court will not exercise jurisdiction if such exercise would interfere with an ongoing state court criminal prosecution. *Younger v. Harris*, 401 U.S. 37, 46, 91 S. Ct. 746, 751 (1971). The *Younger* doctrine requires that a federal court exhibit "comity," that is, a "proper respect for state functions." *Id.* at 44, 91 S. Ct. at 750. Where vital state interests are involved, a federal court should abstain "unless state law clearly bars the interposition of the constitutional claims." *Moore v. Sims*, 442 U.S. 415, 426, 99 S. Ct. 2371, 2379 (1979). Courts considering the application of the *Younger* doctrine should consider three factors "(1) the judicial or judicial in nature state proceedings must be on-

going; (2) the proceedings must implicate important state interests; and (3) there must be an adequate opportunity in the state court proceeding to raise constitutional challenges." *Barichello v. McDonald*, 98 F.3d 948, 955 (7th Cir. 1996) (citing *Trust & Inv. Advisers, Inc. v. Hogsett*, 43 F.3d 290, 295 (7th Cir. 1994)). The Commissioners argue that all three factors are satisfied because (1) Ameritech's petition for review of the ICC's March 11, 1998 order is currently pending in the Third District Appellate Court; (2) the regulation of telecommunications carriers is an important state interest and matter of substantial public concern; and, (3) Ameritech has an adequate opportunity to raise any federal issues in the ongoing state proceedings.

This court finds that *Younger* abstention is applicable to the instant case because there is no available state remedy for review of the ICC's decision. As this court has explained, under the Telecommunications Act, federal courts provide exclusive review for the decisions of state commissions. *See Michigan Bell*, __ F. Supp.2d at __, 1998 WL 413749, at *8 (finding that abstention does not apply because federal courts have exclusive jurisdiction over plaintiffs' 252(e)(6) claim).

IV. CONCLUSION

For the reasons stated in this Memorandum Opinion and Order, the Commissioners' first and second motions to dismiss are DENIED.

Enter:_____
David H. Coar
Federal District Court Judge

Dated: August 25, 1998

APPENDIX E – CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTIONAL PROVISIONS

1. The Supremacy Clause, U.S. art. VI, cl. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. U.S. Const amend. XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATUTES

FROM TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS CHAPTER 5. WIRE OR RADIO COMMUNICATION GENERAL PROVISIONS

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation.

(1) Voluntary negotiations. Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation. Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration.

(1) Arbitration. During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner.

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond. A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission.

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set

forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate. The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration. In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

* * *

(e) Approval by State Commission. --

(1) Approval required. Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds For Rejection. -- The State commission may only reject --

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that --

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under section (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority. Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision. If the State commission does not act to approve or reject the agreement within 90 days after submission by

the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act. If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions. In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in

an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

(f) Statements of Generally Available Terms.

(1) In general. A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

(2) State commission review. A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review. The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission --

(4) Authority to continue review. Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected. The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

* * *

* * *

(h) Filing Required. -- A State Commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

* * *

Section 601 of the Telecommunications Act of 1996:

SEC. 601. APPLICABILITY OF CONSENT DECREES AND OTHER LAW.

* * * *

(c) FEDERAL, STATE, AND LOCAL LAW.—

(1) NO IMPLIED EFFECT.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

ILLINOIS COMPILED STATUTES (1998)
CHAPTER 220. UTILITIES

Article XIII

5/13-514 Prohibited Actions of Telecommunications Carriers

§ 13-514. Prohibited Actions of Telecommunications Carriers. A telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. The following prohibited actions are considered per se impediments to the development of competition; however, the Commission is not limited in any manner to these enumerated impediments and may consider other actions which impede competition to be prohibited:

(1) unreasonably refusing or delaying interconnections or providing inferior connections to another telecommunications carrier;

(2) unreasonably impairing the speed, quality, or efficiency of services used by another telecommunications carrier;

(3) unreasonably denying a request of another provider for information regarding the technical design and features, geographic coverage, information necessary for the design of equipment and traffic capabilities of the local exchange network except for proprietary information unless such information is subject to a proprietary agreement or protective order;

(4) unreasonably delaying access in connecting another telecommunications carrier to the local exchange network whose product or service requires novel or specialized access requirements;

(5) unreasonably refusing or delaying access by any person to another telecommunications carrier;

(6) unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers;

(7) unreasonably failing to offer services to customers in a local exchange, where a telecommunications carrier is certificated to provide service and has entered into an interconnection agreement for the provision of local exchange telecommunications services, with the intent to delay or impede the ability of the incumbent local exchange telecommunications carrier to provide inter-LATA telecommunications services; and

(8) violating the terms of or unreasonably delaying implementation of an interconnection agreement entered into pursuant to Section 252 of the federal Telecommunications Act of 1996[1] in a manner that unreasonably delays or impedes the availability of telecommunications services to consumers.

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1. 47 U.S.C.A § 252